

IDAHO JUDICIAL COUNCIL

SUMMARY OF INFORMAL ETHICS ADVISORY OPINIONS

YEAR 2014

1. A judge's son has been arrested, what actions, if any, may the judge take in his son's case?

ANSWER: Canon 4 requires that a judge conduct all extra-judicial activities so that they do not cast reasonable doubt on the judge's capacity to act impartially as a judge or interfere with the proper performance of judicial duties. Accordingly, the judge's spouse should be the direct contact with law enforcement/judiciary in this matter. At no time should the judge utilize his position to obtain concessions. The judge may be involved with his spouse in selecting an attorney to represent their son. However, Canon 3 will require that the judge disqualify himself in any cases where the son's attorney appears. The judge should also advise the parties in the cases where the law enforcement agency that arrested his son appears during the time the case is active and a reasonable time thereafter. Of course, the son's attorney should be paid his regular rate.

2. A judge has a case involving a health care provider. This is the same health care provider that insures him and his family as well as all other state employees. Is the judge required to disclose the potential conflict to the parties before proceeding?

ANSWER: Yes. Canon 3E requires that he should disclose on the record the information that he believes the parties or the lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

3. A judge has a post-divorce suit on a judgment entered some years ago wherein the parties now filed suits in equity attempting to get the judge to re-write the judgment. Later the judge signed a mental hold on one of the parties. Should the judge recuse himself in the suit in equity?

ANSWER: Canons 3B(1)(7) and 3E(1) require that, as the fact finder, a judge thinking that one of the parties may be mentally ill must recuse. Here the judge received information that would cause bias in any reasonable fact finder.

4. A candidate for District Court Judge wants to leave literature supporting his judicial campaign at both Democrat and Republican political booths at upcoming local fairs. Is this permissible?

ANSWER: Canon 5A(1)(d) prohibits a judge or judicial candidate from seeking the endorsement of any political organization. The Idaho Republican and Democratic parties meet the definition of a political organization under the Code. The question is whether asking the political parties to place a judge's campaign literature in fair booths constitutes "seeking the endorsement of a political organization" prohibited by Canon 5. Playing into this analysis is Canon 2 that requires that a judge should avoid not just impropriety but the appearance of any impropriety. The public seeing a judge's campaign literature at a party booth could view this as partisan political activity by the judge. A member of the public might only see the candidate's literature at one booth and not the other and get the wrong impression about his impartiality. Cases from around the United States indicate that judges will be publically reprimanded for giving the appearance that they were endorsed by parties and for failing to disclaim any appearance of partisan endorsement during a non-partisan election. A judicial candidate may leave his materials with a party organization but only if it is accompanied

with a notice that it is to be displayed with the materials stating that judicial elections are non-partisan, that the judge has not sought the endorsement of any political party nor endorsed or opposed any person seeking another public office and that the presence of the distribution of material at any event should not be interpreted as endorsement or for seeking endorsement by the political party. In this way, the public is advised of the independent nature of judicial elections and the fact that no endorsement has occurred or was sought.

5. A judge wants to know whether it would be inappropriate for him to participate in a program that connects inmates with their children through recording of book readings taped and delivered to the children?

ANSWER: Here the involvement with this program is acceptable and the only question that would arise is one of conflict or bias given the connection with an inmate that may have a case pending before the judge. A recusal in such an instance would avoid the appearance of impropriety.

6. A new magistrate judge was a long time deputy prosecutor for the county. Can individuals previously prosecuted by this individual appear before him?

ANSWER: The judge must disqualify himself /herself in any proceeding in which the judge's impartiality might reasonably be questioned. In this instance, the judge should not handle any judicial work with respect to individuals that were previously prosecuted by the judge.

7. A judge wonders whether or not she can provide a reference for an individual applying to a Ph.D program. This individual is also a domestic violence treatment provider in the county. The judge is uncomfortable because people attending her program may become aware of the reference.

ANSWER: Canon 2B allows for a judge to provide a confidential recommendation to an educational institution concerning someone seeking to further his or her education. The judge should insert at the top of the recommendation letter the phrase "this is a confidential reference per the Idaho Code of Judicial Conduct and is not to be disclosed beyond the addressee".

8. A judge has a relative that has been hired as a deputy prosecuting attorney. The judge performs arraignments, PTCs, sentencing, CPOs, NCOs and preliminary hearings in this county. The judge recognizes that he should not preside in any type of cases where the relative is handling the matter. The judge wonders whether this arrangement must continue indefinitely?

ANSWER: Yes. Having a relative in the prosecutor's office falls precisely within the scope of Canon 3E which prohibits a judge handling a matter where he may have a personal bias concerning a party or a party's lawyer. Further, in this instance, Canon 3E(1)(d) is implicated since an individual within the third degree of kinship to the judge is acting as a lawyer in the proceeding.

9. A local attorney received a DUI and her refusal was assigned to the judge. The judge has known the attorney for years but only on a professional basis. The judge states that he doesn't have a problem keeping the case other than it feels a little uncomfortable. Is this an instance where the judge should recuse?

ANSWER: The judge should handle the matter if he has no bias. Here the judge has stated he does not have any bias.

10. A law clerk wants to participate as a volunteer in a youth diversion program. Investigation of the program indicates that it is quasi prosecutorial in nature. Is the law clerk able to participate?

ANSWER: No. The law clerk would be performing legal services in violation of Canon 3G. The law clerk should not become involved in this program because this pro bono legal work presents an appearance of impropriety and would involve matters of public controversy along with issues likely to become before the judicial employee's court.

11. A prosecutor asked the judge if it would be okay for the prosecutor to take drug forfeiture proceeds and deposit them into the drug court fund. The funds might be used for testing, training, equipment, participant rewards and prizes. The judge wonders whether this would require him to disqualify from sitting on any of the forfeiture proceedings because of the funds that his court would immediately inherit if this change takes place.

ANSWER: This question involves both policy and ethics. The first question why is the prosecutor is asking the judge about this issue? The judge does not have any apparent budgetary authority with respect to this program. There should be a separation also between the court decision of a forfeiture and serving the judge's favorite cause. By having interest in the funding the judge has a bias in favor of forfeiture. The judge should not become involved in the prosecutor's decision.

12. A provider of housing for people in the mental health court asks if the judge could be in a photograph and story that would go in the local paper. Is this appropriate?

ANSWER: No. Canon 2 requires that a judge shall not lend the prestige of the office to advance private interests.

13. A law firm contacts the Judicial Council wondering if it is proper to write a letter of reference and recommendation for a candidate for a magistrate judge position. The law firm asks if the candidate they supported was appointed, would the judge have to disqualify from the firm's cases because of the appearance impropriety or would the judge have to disclose the letter to opposing counsel in every case in which the law firm appeared.

ANSWER: The law firm was advised that the judge would have to disclose the fact that the law firm did support the judge's appointment if the judge was aware of the support. Per Canon 3E a judge must disqualify in any proceeding which the judge's impartiality might reasonably be questioned. Here the law firm could be viewed as instrumental in obtaining the appointment for judge and it could be believed that the judge owed a favor to the law firm for their support. The connection must be disclosed.

14. A judge asks whether he could put signs for a candidate for district judge on property that is owned by an LLC that he has an interest in.

ANSWER: No. The appearance of impropriety is present since the Canon requires that a judge not support judicial campaigns. Specifically, Canon 5 requires that a judge shall not publically endorse or oppose another candidate for public office.

15. A candidate for a judicial position wonders whether Canon 5A prohibits making statements concerning his biography.

ANSWER: The judicial canons center on a judge speaking about the matters of law, the legal

system or the administration of justice. See Canon 4B and 5A(2). The comments state that the purpose of the restriction is to prevent the judge from promoting or identifying with party politics. Describing a judicial candidate's background does not promote party politics and is outside the prohibition.

16. A judge completed a trial in a criminal matter and had no criticism of the defendant's attorney's performance. The judge observed that the attorney represented the defendant quite well and the achieved a favorable outcome given the facts of the case. The attorney then approached the judge and told him that the client had filed a complaint against the lawyer with the Bar alleging that he was unprepared, gave bad advice and did not handle the case professionally. In fairness to the attorney, the judge wants to contact the Bar and provide a response to the Bar complaint.

ANSWER: The judge is restricted from voluntarily assisting any person in litigation or discipline matters. The attorney should notify the Bar that there are witnesses, and if the Bar then contacts the judge and wants his input the judge is then able to respond if subpoenaed.

17. A judge wonders whether he could serve as a commissioner on the Idaho Dept of Fish and Game. He has been approached to apply for a vacancy. The judge does not see any direct conflict with day-to-day work on the judiciary but it is a governmental appointment and the topics can be contentious in the public eye. Can he seek the appointment?

ANSWER: Canon 4C prohibits a judge from accepting any appointment to a governmental committee or commission when that agency is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. Here the Fish and Game Commission is concerned with policy matters outside the scope of these restrictions. The judge should not seek this appointment.

18. Approximately ten years ago a judge represented a mother in a custody dispute with her boyfriend. The boyfriend has now been charged with intimidating a witness. The intimidated witness is the daughter of the woman he previously represented. What should the judge do?

ANSWER: Canon 3E requires that a judge disqualify himself in any proceeding in which the judge's impartiality might reasonably be questioned, including, but not limited to instances where the judge served as a lawyer in the matter in controversy. Here his alleged conflict is quite remote; the judge never did represent the daughter and the subject matter of the current criminal case is completely different than the custody issues. However, the judge should disclose on the record information that the judge believes the parties and the lawyers might consider relevant to the question of disqualification even if the judge believes there is no real basis for the disqualification.

19. Idaho Code § 39-3134 requires the Administrative District judge appoint a representative of the judiciary to the Reconstituted Regional Behavioral Health Board. Can a district or magistrate judge serve on this board?

ANSWER: In accordance with Idaho Code of Judicial Conduct 4C(1), a judge is allowed to consult with an executive branch body only on matters concerning the law, the legal system or the administration of justice. Per Canon 4C(2) a judge may not accept an appointment to any governmental committee, commission or position if the appointment will be concerned with the issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice. Here the state statute requires the judge be a member of the board. In this instance, any judge accepting such an appointment must specify in his/her acceptance that "as a

member of the judicial branch, my appointment to this board is limited to issues that arise concerning the law, the law system or the administration of justice and I will not be asked to consider nor can I discuss matters of state policy or agency decision-making as I lack authority to consider or discuss the same."

20. Several judges contacted the Idaho Judicial Council with respect to the same issue. Judges are asked to attend the ITLA conferences and judges are allowed to attend for free. Are these appropriate conferences for the judges to attend? Do the judges need to attend both the plaintiffs conference and the defendant's conference to avoid the appearance of impropriety?

ANSWER: To void the appearance of bias or favoritism, judges should try to attend gatherings that are not exclusive as to one group or faction. If all interests are invited to attend then it is permissible for the judge to attend. That said, there are some advocacy groups and interests that the judge cannot support. The primary ones are oriented toward victim's rights (like MADD). Often times these groups offer little legal training and the benefit to the judge appears to be quite minimal. By carefully selecting the type of seminar and balancing attendance, the judge avoids being labeled.

21. A young man whom a judge has known his whole life is now attempting to obtain a state employment position. When the judge was a prosecutor, the judge prosecuted this young man for a serious crime. He completed all probation and his record was expunged. The state employing entity notified him that he is not eligible to work for the state at any level given his previous juvenile record. The young man is appealing this decision and is soliciting letters of support. The judge notes that as the prosecutor, he knows the exact facts of the case and knows this young man better than anyone except for the man's own father. The judge wants to come to the young man's aid and prepare a written response to the state agency.

ANSWER: Here the judge is interjecting/volunteering himself as a fact/law witness which is directly prohibited by the Canons. This young man has a lawyer who should be able to handle all the legal arguments without the judge's help. If the judge is indeed subpoenaed, then the Canons allow him to testify completely and truthfully.

22. A judge's clerk is filing for divorce and the judge wants to know if another judge can handle the matter where they have everything worked out and the divorce would be going by stipulation. The judge read a prior informal ethics opinion indicating the case involving a judicial employee should go to an out of district judge. Is this still the case?

ANSWER: Yes. Judges should avoid all cases involving co-workers in the same courthouse.

23. A problem-solving court wants to embark on home visits. The homes of those in the problem-solving court would be visited by law enforcement, probation officers, a treatment provider and the judge. Is it permissible?

ANSWER: The home visit with the prosecutor not being present violates the Canon prohibiting ex parte communication. It compromises the judge's judicial immunity and turns the judge into a potential witness. Home visits that include the judge, the prosecuting and defense attorney would be covered by the drug court's staffing exception found in Canon 3B(7).

24. A judge serves as a lay-minister at his church and a volunteer Chaplain at their hospital and nursing homes in the community. The ministerial association has invited him to order a public "day of prayer" celebration. Is this permissible?

ANSWER: Yes.

25. A judge asks if there is a difference between allowing his name to be listed as a reference for someone on a job application and writing a confidential recommendation consistent with Canon 2B.

ANSWER: Yes, there is a difference. A judge should always be sensitive to possible abuse of the prestige of office. The Canons allow a judge to make a confidential recommendation indicating the background and character of an individual based upon the judge's substantial personal knowledge gathered over a substantial period of time with respect to an employer concerning someone seeking employment. Merely being listed as a reference is subject to possible misuse and abuse. A judge in the appropriate circumstance should always write a confidential recommendation explaining his knowledge of the background and character of the individual based upon the judge's personal knowledge rather than being simply listed as a reference.

26. A judge asks whether he can make a contribution to another judge's re-election campaign.

ANSWER: No. Canon 5A allows a judge to privately express his views with respect to judicial candidates, however he is prohibited from making a public statement, such as making a financial contribution.

27. A sitting judge in the district is up for a contested election. Another judge contacts Judicial Council and advises that his wife, who is quite independent, informed her husband the judge that she plans to put up yard signs and donate money to the sitting judge. What should the judge do ... if anything, about his wife's intended actions?

ANSWER: In this instance the judge's wife should be advised by the judge to specify that all political activity is done by her as an individual and is not associated with her husband, the judge. This disclaimer should be noted on checks, petitions, letters, yard signs, etc. She is the one making the political speech and it would be unfair to have anyone misinformed or mislead about who is saying what. The judge himself must maintain his political independence.

28. A judge wants to attend a workshop out of town with respect to DUI refusals. Two of the presenters will be prosecutors from other states. The funding for the workshop comes via MADD. This is similar to the Interlock workshops that were presented around the country over the last two years. Can the judge attend?

ANSWER: An investigation into this matter disclosed that MADD will be a participant at this workshop. Investigation further reveals that funding actually comes from the National Highway Institute, and not MADD. The workshop is open to all groups including the defense bar, involves legal training and not advocacy or policy issues. MADD's involvement in the matter is to facilitate the expenditure of the congressional funds by way of the grant program. Based upon these facts it is permissible for the judge to attend this workshop.

29. One of the parties in a case before a judge runs a local golf course. The judge is an avid golfer and wonders if he can golf at that course while the case is pending.

ANSWER: The judge can golf at that course but would have to disclose the fact that he does have an infrequent business relationship with a party. Judges all have business relationships with various businesses (Albertsons, Chevron, Idaho Power, etc.) The judge should disclose the fact that he

golfs at that course on a monthly basis and the relationship, if any, between the judge and the operator of the golf course.

30. A judge's law clerk interviewed with a law firm in town. Once that interview occurred, the judge properly removed the law clerk from all cases involving that firm. Now the law clerk has accepted an offer from that firm and he has two months of work left before he leaves his judicial employment. There is a pending summary judgment motion involving that firm that the clerk has been working on for several weeks. The judge pulled the law clerk off working on the summary judgment decision. The judge asked whether he needs to disqualify himself from the case because of the current situation.

ANSWER: The appearance/conflict does not call for recusal per se. The judge properly insulated judicial proceedings from possible bias or conflict by removal of the law clerk in the matter. The Canon requires that the judge disclose all facts to the parties and attorneys that they might consider relevant to the question of disqualification, even if the judge believes there is no real basis for the disqualification. Thus the judge should make such a disclosure.

31. A Trial Court Administrator asks about a situation involving local attorneys wanting to meet with him to discuss possible conflicts since they hired a young man as an attorney that happens to be a relative of a magistrate judge. It seems to the TCA that the judge would have to disqualify himself in any case wherein the relative was counsel of record. The TCA hopes the situation would not result in mandatory disqualifications anytime the firm had a case assigned to the judge and the relative was not the attorney of record.

ANSWER: Canon 3E requires that the judge make the disclosure. Recusal is generally not required when the firm, and not the relative appears. However, the answer is different if the relative "has an economic interest in the proceeding". Then, per Canon 3E(1)(c) the judge must disqualify. The question is whether the relative will share in the economic gain due the firm if the firm prevails. If so, then disqualification is required.

32. Several judges within the same district sit together on an informal "courthouse security committee" with other governmental officials, including the Sheriff. Is sitting on such a committee consistent with the Canons?

ANSWER: Yes. Canons 4C(3) and 4C(2) allows judges to sit on a governmental committee concerned with improvement of the law, the legal system, or the administration of justice. Since courthouse security is central to the operation of our legal system, such consultation via committee is allowed.

33. A judge is assigned an adult guardianship case where an Evaluation Committee has already been selected. The judge's church leader is on the Committee. What should the judge do? Upon inquiry it was learned that the judge sees the church leader on Sundays, has a friendly relationship with the individual, does not socialize with him and does not consider him a close friend. The judge also states he is not biased in favor of the individual.

ANSWER: Disqualification per Canon 3E is not required. However, the judge should disclose on the record that information the parties/lawyers might consider relevant to the question.

34. Upon taking the bench, the judge hired a collection agency to collect on all her unpaid, old private practice billings. What action should the judge take when cases brought by the same collection

agency appear on her docket?

ANSWER: She should disqualify. Per Canons 4D(6) and 3E, the judge's impartiality might reasonably be questioned due to the fact that she is a current client of the agency. Per Canon 2A, she must take action to avoid impropriety and promote public confidence in the judiciary. Once the business relationships ends she should disclose the fact for a reasonable period of time.

35. A judge wonders whether he can present at the Citizen's Law Academy.

ANSWER: Absolutely. Per Canon 4B the judge is allowed to speak, write, lecture and teach concerning the law. Some things to be aware of while participating in such a public forum; avoid discussion of pending/impending cases, avoid offering personal opinions on controversial or political topics, always speak and act in a manner that promotes public confidence in the judiciary.

36. The judge's daughter rents a room from a local attorney and the daughter pays her own rent. Should the judge disclose this fact when other attorneys in the same firm appear?

ANSWER: Yes, per Canon 4E. The judge should disclose on the record any information the judge believes the parties or lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

37. A magistrate judge sentenced an elderly man on an inattentive driving, per stipulation, to a fine and costs only. The magistrate signed the judgment and outside his chambers is asked by the defendant if his license would be suspended. The judge replied "No". Later the Public Defender files a motion to dismiss the charge and referenced the ex parte conversation. Idaho Code § 19-2604 (Amendment of Judgement and Dismissal of Charge) is applicable to this case. This was the first the Prosecutor knew about the ex parte contact. The judge asks the Prosecutor if he (the judge) should be continuing with the case. The Prosecutor replies "No, it's Okay." Any ethical breach here?

ANSWER: Per Canon 3B(7) a judge shall not initiate, permit or consider an ex parte communication. The off-the-record conversation outside chambers with the defendant was an ex parte communication concerning a pending/impending case. A case is pending until all time for appeal has expired. A case is impending when it has some likelihood of being filed. It seems criminal cases, especially with the applicability of Idaho Code § 19-2604, should be considered to be "impending" for this foreseeable future due to the fact that such motions can be brought at seemingly any time in the future per Idaho Code § 19-2604(3)(c). As far as asking whether the court could continue with the case, Canon 3E does not require disqualification in this instance, but does require disclosure to the parties.

38. A judge had been trained in the past on Standardized Field Sobriety tests and was also qualified as an instructor. Now on the bench, he has an upcoming DUI trial where the expert will be his past primary instructor. Does he need to disqualify?

ANSWER: If the expert you know said one thing, and the opposing expert said another, would you tend to believe the expert you know? If the answer is "yes", you are not impartial. You have a bias in favor of the expert you know. You should disqualify. At a minimum, you must disclose the past relationship.

39. Same question as No. 38, but the judge wonders if the parties can waive the disqualification?

ANSWER: Once the bias is communicated to the attorneys/parties, the likelihood of a waiver is practically nonexistent. As a matter of ethics policy, there should never be a circumstance where an admittedly biased judge sits on a case.

40. Same question as No. 38 but the judge wonders what the judge is to do when the judge has a DUI court trial. Can the judge utilize her specialized training as the basis for a decision?

ANSWER: Of course, the verdict must be based on the evidence presented and only on the evidence presented. With that said, as the trier of fact, the judge brings all her life experiences, including training, to bear on the decision.

41. A judge observed a Problem Solving Court participant in an establishment that serves alcohol. The judge does not handle the Problem Solving Court. Whom should he contact with that information?

ANSWER: The Probation Officer.

42. A judge is retiring and local lawyers want to buy the judge some retirement gifts. The judge will have Senior status after retirement. How can the donations be collected and spent for this purpose?

The best approach is to collect the donations under the auspices of the local bar association. No individuals should be identified as having donated or having declined a donation. Canon 4D(5) is not violated when anonymous donors are involved via the local bar association.